IN THE SUPREME COURT OF MISSOURI

No. SC84906

STATE OF MISSOURI ex rel. VERIZON COMMUNICATIONS INC., VERIZON TRADEMARK SERVICES LLC, VERIZON SERVICES CORP., TELESECTOR RESOURCES GROUP, INC., VERIZON WIRELESS (VAW) L.L.C., and GTE.NET L.L.C.,

Relators,

v.

THE HONORABLE MARGARET M. NEILL,
Judge, Division 1, Circuit Court of the City of St. Louis,

Respondent.

On a Petition for a Writ of Prohibition,
or, in the Alternative, for a Writ of Mandamus

REPLY BRIEF OF RELATORS VERIZON COMMUNICATIONS INC., VERIZON TRADEMARK SERVICES LLC, VERIZON SERVICES CORP., TELESECTOR RESOURCES GROUP, INC., VERIZON WIRELESS (VAW) L.L.C., and GTE.NET L.L.C.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

ARGUMENT

I. Respondent is required to stay the State Action pending the final determination of the Federal Action because: (1) the Federal Action was filed properly and in good faith six weeks before the State Action; (2) the Federal Action involves the same facts and subject matter as the State Action; (3) Inverizon's claims in the State Action have always been compulsory counterclaims in the Federal Action; and (4) absent a stay of the State Action, there will be a race to judgment in the federal and state courts, simultaneous discovery, motion practice, and trials in the Federal Action and the State Action, and an unnecessary duplication of judicial efforts.

As discussed in Verizon's initial brief, Respondent is required to stay the State Action pending the final determination of the Federal Action regardless of whether the Court reviews Respondent's order denying Verizon's motion to stay de novo or for abuse of discretion. Under the rule set forth in this Court's decision in Johnson v. American Surety Co. of New York, 238 S.W. 500, 502 (Mo. 1921), a stay is mandatory. But even if Johnson allows for discretion, Respondent abused her discretion, as a matter of law, by failing to stay the State Action.

A state action must be stayed in favor of a federal action if, as is the case here, the federal action was first and properly filed in good faith and the claims in the later-filed state action are compulsory counterclaims in the federal action. Johnson, 238 S.W. at 502. Notwithstanding Inverizon's attempt to relitigate the issue, the United States Court

of Appeals for the Eighth Circuit has already held that Verizon filed the Federal Action properly and in good faith six weeks before the State Action and that Inverizon engaged in improper forum shopping. Verizon Communications, Inc. v. Inverizon International, Inc., 295 F.3d 870, 874-75 (8th Cir. 2002) (A7-8). Moreover, Inverizon does not dispute that the Federal Action involves the same facts and subject matter as the State Action and that its claims in the State Action have always been compulsory counterclaims in the Federal Action. Finally, absent a stay of the State Action, there will be a clash between the federal and state courts, a race to judgment, simultaneous discovery, motion practice, and trials in the Federal Action and the State Action, and an unnecessary duplication of judicial efforts. It is these facts, and others, that Respondent ignored, and her failure to acknowledge these facts constitutes a clear abuse of discretion. Given these undisputed facts, the State Action should be stayed.

A. A stay of the State Action is in accord with public policy.

In Johnson, this Court stated it "cannot be questioned" that "[w]here an action is instituted in the federal court, a subsequent action in the state court involving the same subject-matter **will be stayed** pending the final determination of the prior action in the federal court." 238 S.W. at 502 (emphasis added). This Court noted that this rule of law "results from the principle of comity which obtains between courts of concurrent jurisdiction, a principle which requires that a subject-matter drawn and remaining within the cognizance of a court of general jurisdiction **shall** not be drawn into controversy or litigated in another court of concurrent jurisdiction." Id. (emphasis added).

Inverizon argues that the rule in Johnson "is bad policy," because Inverizon maintains, it "judicially sanction[s] a race to the court house and reward[s] the swiftest or stealthiest with their choice of forums." Respondents' Br., p. 34. This is untrue. A stay of a second-filed state action is required only if the federal action was filed first, properly, and in good faith. If the federal court determines that the federal action is merely an anticipatory filing or involves improper forum shopping, it can stay the federal action in favor of the later-filed state action. Moreover, there are a number of federal abstention doctrines that—in circumstances other than those presented here—might lead a federal court to defer to a later-filed state action. See, e.g., Wilton v. Seven Falls Co., 515 U.S. 277 (1995); Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491 (1942); Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941). (Inverizon sought a dismissal or stay of the Federal Action under Wilton and Brillhart, but the Eighth Circuit held that a dismissal or stay was inappropriate. Verizon Communications, 295 F.3d 870.)

The determination as to which action should proceed should be made by the court in the first-filed action and the court in the second-filed action should defer to that determination. If the court in the first-filed action determines that dismissal or stay of the first-filed action is warranted, then the court in the second-filed action may proceed. If, as is the case here, the court in the first-filed action (i.e., the federal district court) determines that the first-filed action should proceed, the court in the second-filed action (i.e., Respondent) should respect that determination and stay its hand. Public policy

should not countenance competition or a race to judgment between federal and state courts.

The Eighth Circuit had previously held that the Federal Action should proceed because "the facts here do not support a finding that Verizon engaged in improper forum shopping or an anticipatory filing" and "do not indicate a rush to the court house by Verizon." Verizon Communications, 295 F.3d at 874-75 (A7-8). Respondent should have respected the Eighth Circuit's determination and, under Johnson, should have stayed the State Action so as to not interfere with the pending Federal Action. Inverizon can fully and fairly litigate its claims in the Federal Action. Why should scarce judicial resources and taxpayer money be wasted on Inverizon's duplicative and unnecessary case, a case that the Eighth Circuit recognized as a "strike suit"? See Verizon Communications, 295 F.3d at 875 (A8) (Bye, J., concurring).

The position that Inverizon advocates—that courts should allow parallel lawsuits to proceed—is bad public policy and would not be tolerated if both actions between Verizon and Inverizon were pending in Missouri state courts. Based on the stated purpose of Missouri Rule of Civil Procedure 55.32(a), this Court has held that a party is not allowed to commence an action in Missouri state court to assert a claim that is a compulsory counterclaim in a pending, previously-filed action in Missouri state court. State ex rel. J.E. Dunn, Jr., & Assoc., Inc. v. Schoenlaub, 668 S.W.2d 72, 75-76 (Mo. banc 1984) (writ of prohibition issued requiring party to assert claims in second-filed action as compulsory counterclaims in first-filed action); State ex rel. Buchanan v.

Jensen, 379 S.W.2d 529, 531 (Mo. banc 1964) (same). This Court explained that this rule is consistent with the purpose of Missouri's compulsory counterclaim rule, "which is to avoid a multiplicity of suits and to dispose of litigation more expeditiously and properly." Buchanan, 379 S.W.2d at 531.

Inverizon offers no reason why a like rule should not apply in dual cases pending in federal and Missouri state courts. The federal compulsory counterclaim rule (Federal Rule of Civil Procedure 13(a)) is identical to and has the same purpose as the Missouri compulsory counterclaim rule (Rule 55.32(a)). The rule set forth in Johnson supports the purpose of the federal compulsory counterclaim rule by avoiding a multiplicity of suits and disposing of litigation more expeditiously and properly. In fact, Inverizon implicitly concedes that its claims in the State Action have always been compulsory counterclaims in the Federal Action. Indeed, Inverizon has now filed its claims in the State Action as counterclaims in the Federal Action. By refusing to stay the State Action, Respondent "effectually defeat[s] the purpose" of Federal Rule 13(a) "inconsistent with that spirit of reciprocal comity and mutual assistance required for the effective operation of our two systems of courts." Sparrow v. Nerzig, 89 S.E.3d 718, 722 (S.C. 1955).

B. Verizon properly brought the Federal Action in good faith and not as a "preemptive strike" to deprive Inverizon of its chosen forum.

Although completely rebuffed by the Eighth Circuit, Inverizon refuses to give up on its untenable argument that Verizon somehow improperly deprived Inverizon of its chosen forum and that Verizon launched a "preemptive strike" by filing the Federal

Action. This Court should adhere to the Eighth Circuit's conclusion that "the facts here do not support a finding that Verizon engaged in improper forum shopping or an anticipatory filing." Verizon Communications, 295 F.3d at 874 (A7). The Eighth Circuit's conclusion is fully supported by the undisputed facts that:

- Inverizon's "cease and desist letter did not indicate that litigation was imminent";
- Verizon filed the Federal Action approximately five weeks after it received Inverizon's cease and desist letter and only after Inverizon provided no further information to substantiate Inverizon's claims that Verizon's use of the VERIZON mark infringed upon the INVERIZON mark; and
- "Verizon chose to bring [the Federal] [A]ction in Missouri, the state of Inverizon's incorporation at the time, and not some inconvenient forum."

Id. at 874-75 (A7-8). "These facts do not indicate a rush to the court house by Verizon." Id. at 875 (A8).

Moreover, contrary to its suggestion (p. 12), Inverizon did not file the State Action "quickly" even after Verizon filed the Federal Action. Instead, six weeks lapsed between the filing of the Federal Action and the State Action, presumably because Inverizon was preoccupied with changing its state of incorporation so that it could prevent Verizon from removing the State Action to federal court. Inverizon obviously was not ready to commence litigation on August 30, 2000 when Verizon filed the Federal Action. The Federal Action, therefore, can hardly be viewed as a "preemptive strike."

Inverizon claims that its July 25, 2000 cease and desist letter to Verizon "expressly mentioned 'formal legal action,'" Respondent's Br., p. 11, yet apparently believes that Verizon should have waited two and one-half months later until Inverizon filed the State Action on October 16, 2000 before seeking to clear the potential cloud on the VERIZON mark created by Inverizon's accusations of trademark infringement and dilution. The July 25 Letter, however, "did not indicate that litigation was imminent," Verizon Communications, 295 F.3d at 874 (A7), and Verizon was not required to wait forever for Inverizon to bring suit after having invested substantial resources in its VERIZON mark.

Additionally, until it actually filed the State Action, Inverizon never gave Verizon any indication that its preferred forum for any potential litigation against Verizon would be in the Circuit Court of the City of St. Louis. To the contrary, having accused Verizon of violating the federal Lanham Act in its July 25 Letter, Inverizon signaled that any future litigation would be in federal court, where virtually all trademark cases are litigated. See Verizon Communications, 295 F.3d at 873 (A6) ("[F]ederal courts now decide all but a few trademark disputes."). Given these facts, Inverizon fails to explain how Verizon could have knowingly and intentionally deprived Inverizon of its preferred forum.

It is these facts that Respondent studiously ignored, relying instead on the so-called "extensive discovery" in the State Action. A2. But the progress of discovery in the Federal Action was effectively identical to that of the State Action at the time that Respondent ruled. As Inverizon itself has acknowledged (Respondent's Br. at 39), all

discovery in the State Action is equally applicable to the Federal Action. Indeed, the only reason that discovery had advanced so far in the State Action alone was because the federal district court had erroneously stayed the Federal Action, an error which was corrected by the Eighth Circuit's decision.

Inverizon also asserts, for the first time, an argument that it never even presented to Respondent. Specifically, Inverizon claims that "Verizon knew about the cloud on its mark well before it received a cease-and-desist letter" from Inverizon because Verizon discovered the INVERIZON mark during its trademark search. Respondent's Br., p. 40. Inverizon cites no evidence to support this bold assertion and there is none. While Verizon's trademark search listed a registration for INVERIZON for "agricultural business and management consulting services," Verizon reasonably and naturally concluded that its adoption of its VERIZON mark would in no way infringe or otherwise dilute any rights that Inverizon may have in INVERIZON—a different mark for very different services. Although the merits of Inverizon's claims are not at issue in this appeal, it is difficult to imagine how one could conclude that the use of the VERIZON mark in providing telecommunications services infringes upon the use of the INVERIZON mark in providing agricultural consulting services. Indeed, the United States Patent and Trademark Office did not perceive any conflict between the two marks, approving the VERIZON mark for registration despite the presence of the INVERIZON registration for agricultural-related services. Thus, Verizon was not aware of any potential "cloud" on its mark until Inverizon accused it of trademark infringement in its

July 25 Letter.[1] As legions of trademark cases have established, a party's mere knowledge of another party's trademark is not evidence of intent to infringe. See General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 627 (8th Cir. 1987); Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club, LP, 2002 WL 1763999, *8 (D. Minn. Jul. 26, 2002) (evidence that defendants knew of plaintiff's mark does not show intent to deceive).

Moreover, while the INVERIZON and VERIZON marks may share the same letter-string, "v-e-r-i-z-o-n," this alone does not indicate that there is a likelihood of confusion between the two marks. It is firmly established that "[t]he use of identical, even dominant, words in common does not automatically mean that two marks are similar." General Mills, 824 F.2d at 627 (affirming finding that OATMEAL RAISIN CRISP and APPLE RAISIN CRISP are not confusingly similar); see also United States

[1] Inverizon's reliance on Verizon's cease and desist letters not only misstates the content of those letters, but is also misplaced. See Respondent's Br., p. 41. Verizon never sent a letter to anyone using "Inverizon.com." Instead, Verizon wrote to a "cybersquatter" who had registered, among other names, the Internet domain name "iverzion.com" immediately following the launch of the VERIZON mark, with no use of the name in a legitimate business, and with the obvious intent of trying to extort money from Verizon. This cybersquatting situation is radically different from this case, in which Inverizon complains about Verizon's use of its name and mark in connection with its telecommunications business.

Jaycees v. Commodities Magazine, Inc., 661 F. Supp. 1360, 1363 (N.D. Iowa 1987) (granting summary judgment for defendant, finding no likelihood of confusion between use of FUTURE and FUTURES marks in connection with magazine titles). Trademarks do not exist in a vacuum, but, rather are connected to specific goods and services. Accordingly, any likelihood of confusion analysis must take into account the specific services with which the marks at issue are being used. When the marks are used in connection with very different services, as is the case here, consumer confusion is highly unlikely.

There is also no evidence to support Inverizon's baseless claim that "Verizon concealed its intention to file a declaratory judgment action against Inverizon." Respondent's Br., p. 41. (If anything, Inverizon concealed its intention to file the State Action against Verizon in the Circuit Court of the City of St. Louis.) Inverizon does not dispute that after Verizon received Inverizon's July 25 Letter:

- Verizon's counsel contacted Inverizon's counsel to discuss a possible resolution of the matter;
- Verizon's counsel proposed a coexistence agreement between the parties, believing that their respective services (telecommunications versus agricultural consulting) were sufficiently distinct such that there would be no public confusion from the concurrent, respective use of the VERIZON and the INVERIZON marks;

- Inverizon's counsel immediately dismissed this idea, contending that there was an "overlap" between the services that each company provided; and
- when Verizon's counsel inquired of the nature of this "overlap," Inverizon's counsel responded that it was "in the wireless business"; yet, when pressed for details regarding Inverizon's "wireless business," he could not provide this information, but simply stated that he would get back to Verizon.

A92 (¶ 5). Nor does Inverizon dispute that Inverizon's counsel never got back to Verizon.[2] Inverizon faults Verizon's counsel for not following up with its counsel, but Verizon's counsel had left the ball in Inverizon's counsel's court. Verizon attempted to resolve the parties' dispute short of litigation, but Inverizon failed to maintain any meaningful dialogue with Verizon, obviously because it could not substantiate its claim of any "overlap" in services.

[2] In September 2001, Inverizon admitted in the State Action in its response to Verizon's request for admissions that it has never sold or serviced any wireless communications equipment and that it has never described itself or advertised itself as a "wireless company."

C. Inverizon is guilty of improper forum shopping in filing the State Action.

Whereas Verizon filed the Federal Action first, properly, and in good faith, Inverizon is guilty of improper forum shopping in filing the State Action. See Verizon Communications, 295 F.3d at 874 n.2 (A7). Inverizon changed its state of incorporation from Missouri to Delaware—which, not coincidentally, also happens to be the state of incorporation for Verizon—after Verizon filed the Federal Action and shortly before Inverizon filed the State Action. Inverizon originally admitted in its answer to Verizon's writ petition (¶ 14) that it did so to defeat diversity, but now contends in its proposed amended answer that its admission was "inadvertent." Inverizon, however, has never offered an explanation for why it changed its state of incorporation to match that of Verizon—not before the federal district court, not before the Eighth Circuit, not before Respondent, and, even now, not before this Court. When questioned about this by the Eighth Circuit at oral argument, Inverizon's counsel responded that the reason for the change was "privileged." As the Eighth Circuit concluded, it is obvious that the only reason for Inverizon's change in its state of incorporation was to prevent Verizon from removing the State Action to federal court. See Verizon Communications, 295 F.3d at 874 n.2 (A7). The Court, therefore, should deny Inverizon leave to amend its answer to Verizon's writ petition at this late date.

Unable to justify the change in its state of incorporation, Inverizon now argues for the first time ever that it could have defeated diversity when it filed the State Action by

naming another Verizon affiliate, GTE Midwest Inc. d/b/a Verizon Midwest, a Missouri corporation, as a defendant. Respondent's Br., pp. 12-13. In support of its argument, Inverizon cites to materials included in the appendix to its brief (at Tab 11) that were never before Respondent when she denied Verizon's motion to stay, do not reflect subsequent developments in the Federal Action or the State Action, and are not properly part of the record before this Court. The Court should strike and disregard Inverizon's argument and Tab 11 of its appendix.

Nevertheless, the hypothetical fact that Inverizon could have named GTE Midwest Inc. as a defendant when it filed the State Action is irrelevant because Inverizon did not do so. Even now, after Inverizon has added numerous Verizon affiliates as parties in the two actions, Inverizon has not asserted any claims against GTE Midwest Inc., either in its counterclaims in the Federal Action or in its proposed second amended petition in the State Action. Thus, but for Inverizon's change in its state of incorporation and its disavowal in the State Action of the federal claims that it asserted in its July 25 Letter, the State Action would have been removed to federal court and the parties would not presently be before this Court.

D. Absent a stay of the State Action, there will be a race to judgment in the federal and state courts, simultaneous discovery, motion practice, and trials in the Federal Action and the State Action, and an unnecessary duplication of judicial efforts.

As discussed in Verizon's initial brief (pp. 61-62), Respondent's refusal to stay the State Action fosters an undesirable race to judgment in the federal and state courts and an unnecessary duplication of judicial efforts. To prevail in the race to judgment, the parties will spend enormous additional resources—to conduct discovery, draft motions, and prepare for trial in two lawsuits—above and beyond what they would spend if only the Federal Action proceeds. The rule in Johnson is designed to prevent such a waste of judicial resources and "competition" between the state trial court and the federal district court.

Inverizon argues that if both actions are allowed to proceed, "there will be very little, if any, duplication of efforts." Respondents' Br., p. 39. Inverizon focuses solely on discovery, however, and gives no consideration to the fact that there will be a complete duplication of efforts as to all other aspects of the litigation, including duplicative preparation and resolution of motions and duplicative trials, which are presently set to overlap in May 2003. Inverizon arrogantly proclaims that "the pendency of the state court trial starting on May 5, 2003 will postpone the Federal trial on May 13, 2003," Respondent's Br., p. 39, but there is no indication that the federal district court intends to postpone the trial in the Federal Action. In fact, the federal district court has promptly

ruled on several motions, and has issued a complete scheduling order, contemplating a discovery cutoff of March 15, 2003, a deadline for filing dispositive motions packets in early April 2003, and trial shortly thereafter. A304-09.

Inverizon complains that since this Court issued its preliminary writ staying the State Action, Verizon has refused to conduct further discovery proceedings in the State Action and has required Inverizon to seek discovery from Verizon in the Federal Action. Respondent's Br., p. 14 n.2 and p. 39. Verizon's actions, however, are entirely proper, and Inverizon took the same approach and refused to engage in attempts to resolve discovery disputes in the Federal Action when the Federal Action was stayed. (In fact, contrary to Inverizon's misrepresentation (p. 39), although this Court stayed the State Action, Verizon subsequently produced to Inverizon the documents that Verizon had previously agreed to produce in the State Action.) Because the State Action is presently stayed, all discovery must be conducted through the Federal Action and Respondent lacks jurisdiction to resolve any discovery disputes between the parties. Inverizon's insistence on continuing to pursue the State Action in the face of this Court's preliminary writ further confirms that the Court should issue a permanent writ commanding Respondent to stay the State Action until the Federal Action is completed.

E. Inverizon's attacks on Johnson are unfounded.

Inverizon argues that the Court should disregard the rule set forth in Johnson because, Inverizon contends: (1) the rule is based on the faulty premise that federal courts are courts of general jurisdiction; and (2) United States Supreme Court decisions

before and after Johnson was decided demonstrate that the rule set forth in Johnson is wrong and "discredited dicta." Respondents' Br., p. 31. Neither contention has any merit.

In Johnson, this Court did not state that federal courts are courts of general jurisdiction. Instead, this Court first stated the rule that "[w]here an action is instituted in the federal court, a subsequent action in the state court involving the same subject-matter will be stayed pending the final determination of the prior action in the federal court." 238 S.W. at 502. This Court then explained that this rule of law "results from the principle of comity which obtains between courts of concurrent jurisdiction, a principle which requires that a subject-matter drawn and remaining within the cognizance of a court of general jurisdiction shall not be drawn into controversy or litigated in another court of concurrent jurisdiction." Id. In Johnson, this Court was simply explaining that when a suit is brought in any court having jurisdiction over it, whether federal or state, a court having jurisdiction over a subsequently-filed suit involving the same subject matter should stay the later-filed suit. It is immaterial whether the court in the first suit is a court of general jurisdiction (such as most state courts) or limited jurisdiction (such as federal courts) so long as it has jurisdiction over the suit.

The United States Supreme Court cases cited by Inverizon hold that, as a matter of federal law, a court in a later-filed suit does not lack jurisdiction simply because another suit was filed before in another court. As discussed in Verizon's initial brief (pp. 48-50), however, whether a court must **dismiss** an action for lack of jurisdiction is an entirely

different issue than whether a court must **stay** an action because of a previously-filed action involving the same subject matter. None of the cases cited by Inverizon hold that the court in the later-filed action is precluded from staying the action. (In its initial brief, Verizon discussed and distinguished the cases upon which Inverizon and Respondent rely.)[3] Indeed, in Kline v. Burke Constr. Co., 260 U.S. 226, 230 (1922), the principal

[3] None of the cases upon which Inverizon and Respondent rely address whether the court in the later-filed state action should have stayed the state action pending resolution of the previously-filed action. For example, Dixie Ohio Express Co. v. Eagle Express Co., 346 S.W.2d 30 (Ky. Ct. App. 1961), addressed the discretion of the state trial court to deny leave to amend to assert a claim that was a compulsory counterclaim in an earlier-filed federal action. Similarly, Fowler v. Ross, 191 Cal. Rptr. 183 (Cal. Ct. App. 1983), Efros v. Nationwide Corp., 465 N.E.2d 1309 (Ohio 1984), Goehring v. Harleysville Mutual Casualty Co., 331 A.2d 457 (Pa. 1975), and M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc., 519 S.W.2d 269 (Tex. Civ. App. 1975), all addressed whether the state court should have **dismissed** a later-filed state suit in favor of a previously-filed federal suit for lack of jurisdiction. Indeed, in Efros, the Ohio Supreme Court, in remanding a state case that had been improperly dismissed, held that "the trial court may, if it deems appropriate, grant a stay of the proceedings pending resolution of this cause in the federal court, in the interest of comity and judicial economy." 465 N.E.2d at 1311. Finally, to the extent that the New York trial court in Ackert v. Ausman, 218 N.Y.S.2d 814 (Sup. Ct.

case cited by Inverizon, the Court held that the federal court in a first-filed federal action properly declined to enjoin a second-filed state action from proceeding; the Court had no occasion to address whether the state court should have **stayed** the second-filed state action pending the outcome of the first-filed federal action.

Even so, the United States Supreme Court cases cited by Inverizon decided only issues of **federal law**. Whether Respondent is required to stay the later-filed State Action pending the final determination of the first-filed Federal Action is an issue of Missouri law, not federal law. This Court, not the United States Supreme Court, has the final say on Missouri law. See Scales v. National Life & Accident Ins. Co., 212 S.W. 8, 10 (Mo. banc 1919) ("In the construction of a Missouri statute, where no federal question arises, this court is not bound by an opinion of the Supreme Court of the United States."). Missouri law concerning the issue before this Court is set forth in this Court's decision in

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1961), held that the second-filed state suit need not be stayed, it is inconsistent with more recent cases from the New York appellate courts cited by Verizon in its opening brief. See Goodridge v. Fernandez, 505 N.Y.S.2d 144, 146-47 (App. Div. 1986) (holding that trial court abused its discretion in failing to stay later-filed state action pending the final resolution of previously-filed federal action); Krisel v. Phillips Petroleum Co., 299 N.Y.S.2d 895 (App. Div. 1969) (same).

Johnson, not in any decisions of the United States Supreme Court or other states. Under Missouri law, Respondent is required to stay the State Action.

* * *

For over two years now, the parties have been waging a costly battle on two fronts—one in federal court and one in Missouri state court. The Eighth Circuit has determined that this trademark dispute should be resolved in the first-filed Federal Action. It is time to put Inverizon's "strike suit" on hold and allow the federal courts to resolve the parties' entire dispute promptly and without further interference from the State Action. The State Action should be stayed.

CONCLUSION

For these reasons and the reasons set forth in Verizon's initial brief, the Court should issue a writ of mandamus (or, in the alternative, a writ of prohibition) commanding Respondent to stay the State Action and to take no further action in the State Action pending the final determination of the Federal Action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk have been hand-delivered on January 6, 2003 to:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rules 55.03 and 84.06, is proportionately spaced, using Times New Roman, 13 point type, and contains 5,206 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.